

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Level 3 Communications LLC	)	
Petition for Forbearance From the Payment of	)	WC Docket No. 03-266
Interstate and Intrastate Access Charges	)	
On Its Voice Communications	)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> urges the Federal Communications Commission (Commission or FCC) to deny the Level 3 Communications LLC (Level 3) petition for forbearance from the payment of lawful intrastate and interstate access charges. The petition is nothing more than an attempt to expand the enhanced service provider (ESP) exemption to all voice over Internet protocol (VoIP) services.<sup>2</sup> Exempting all VoIP calls that originate and/or terminate on the public switched telecommunications network (PSTN) from interstate and intrastate access charges would impose a significant and rapidly growing cost burden on ILECs for the origination and termination of VoIP calls and prevent ILECs from recovering these costs from the cost-causing VoIP providers. This would result in the unlawful confiscation of ILEC property without just compensation in direct violation of the 5<sup>th</sup> Amendment of the United States Constitution.<sup>3</sup>

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1 NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of its members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). All of NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

2 *In the Matter of Level 3 Communications LLC Petition for Forbearance from Paying Access Charges for its Voice Over the Internet Communications*, pp. 1-5, WC Docket 03-266 (filed on Dec. 23, 2003).

3 No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property

The issues raised in the Level 3 petition are already being considered in the Commission's Notice of Proposed Rulemakings (NPRMs) concerning inter-carrier compensation and VoIP-enabled services.<sup>4</sup> In the VoIP NPRM, Commissioner Abernathy stated "we plainly have rules on the books *today* - rules concerning interstate access charges and universal service contributions, among other things - that appear to apply to some services offered in the marketplace."<sup>5</sup> VoIP services are emerging and the future application of access charges to these services should be thoroughly considered in the comprehensive VoIP and inter-carrier compensation NPRM proceedings, and not in the duplicative Level 3 petition.

NTCA also urges the Commission to eliminate the ESP exemption that allows all Internet service providers (ISPs) to avoid paying access charges and universal service fund (USF) contributions. Until the ESP exemption is removed, just compensation for the rising ISP use of ILEC networks will not be realized and the future viability of universal service will be at risk. The ESP exemption has unfairly increased the universal service burden on all remaining USF contributors and imposed significant revenue losses on ILECs. The Commission should therefore eliminate the ESP exemption and require all ISPs, and VoIP providers that use the PSTN, to pay applicable access charges and appropriate universal service contributions pending the FCC's final decisions in the inter-carrier compensation and VoIP service proceedings. The Commission "cannot afford to let the rise of VoIP to undercut the very networks that carry it."<sup>6</sup>

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be taken for public use, without just compensation. U.S. Constitution, 5<sup>th</sup> Amendment.

4 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001), and *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No.04-36 (adopted Feb. 12, 2004).

5 Statement of Commissioner Kathleen Q. Abernathy, *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No.04-36 (adopted Feb. 12, 2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243868A3.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243868A3.doc).

6 Statement of Commissioner Jonathan S. Adelstein, Voice over IP Forum (December 1, 2003), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241774A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241774A1.doc).

## **I. INTRODUCTION**

On December 23, 2003, Level 3 filed a petition for forbearance requesting that its voice communications that partially uses Internet Protocol (IP) be exempt from the assessment of interstate and intrastate access charges.<sup>7</sup> Level 3 further requests that forbearance should “not just extend to Level 3, but to all other carriers handling Voice-embedded IP communications that originate and terminate on the PSTN.”<sup>8</sup> The Level 3 petition should be denied.

## **II. FORBEARANCE FROM ACCESS CHARGES IS NOT AN OPTION**

The Commission may forbear from the regulation of telecommunications carriers or telecommunications services only if it determines the regulation of the carrier or service is: (1) not necessary to achieve just and reasonable rates, (2) not necessary for the protection of consumers, and (3) forbearance is consistent with the public interest.<sup>9</sup> The petition fails to meet all three requirements needed for the Commission to forbear from requiring Level 3 to pay intrastate and interstate access charges.

Level 3 is a telecommunications carrier providing voice communications that originate and terminate on ILEC networks. If Level 3 and other VoIP providers were allowed a free ride from paying access charges, the Commission would be handing VoIP providers an unfair advantage in the highly competitive voice communications market in direct conflict with the its own principle of competitive neutrality.<sup>10</sup> Forbearance in this instance would force ILECs to unjustly raise their customer rates to recover costs imposed on their networks by VoIP providers

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<sup>7</sup> *In the Matter of Level 3 Communications LLC Petition for Forbearance from Paying Access Charges for its Voice over the Internet Communications*, pp. 1-5, WC Docket 03-266 (Dec. 23, 2003).

<sup>8</sup> *Id.*, pp. 1-2.

<sup>9</sup> 47 U.S.C. § 159(10)(a)(3).

<sup>10</sup> The FCC’s principle of competitive neutrality requires that rules neither unfairly advantage or disadvantage one provider over another and neither unfairly favor or disfavor one technology over another.

or incur substantial revenues losses. ILEC consumers would have no protection from either higher end-user rates, degradation in the quality of their underlying ILEC network, or the possible loss of their carrier of last resort. Rate shock and potential loss of subscribers to the PSTN and IP networks would be a very real possibility particularly for lower income consumers who do not qualify for LifeLine or Linkup support and who cannot afford a high-speed Internet access connection: specifically, working families who currently can afford ILEC telephone service and/or dial-up Internet service but cannot afford a high-speed Internet access connection that VOIP providers must have in order to offer voice service.

Forbearance from assessing access charges on VoIP traffic is also not in the public interest. Access charges and universal service obligations fall principally and mandatorily on telecommunications service providers, such as Level 3, in recognition of the fact that they benefit from the nationwide public telecommunications system which is supported by access charges and USF contributions. Level 3 and other providers should not be excused from these obligations under the guise that they will be shackled by regulation. The imposition of access and universal service obligations on these providers is not pervasive regulation of entry or rates. Applying access charges to VoIP providers will eliminate the potential for regulatory arbitrage, ensure competitive neutrality, and provide all providers of voice services with certainty pending the outcome of the major proceedings on universal service support, inter-carrier compensation and VoIP. Competition for voice services from VoIP providers will continue to flourish and fair compensation for the use of ILEC underlying networks will take place. The Level 3 petition should therefore be denied.

### **III. THE FCC SHOULD REFER ISSUES RAISED IN THIS PROCEEDING TO THE FEDERAL-STATE JOINT BOARD ON SEPARATIONS**

The petition raises serious questions concerning separations that should be referred the Federal-State Joint Board on Separations. If, as expected, the percentage of VoIP intrastate and interstate calls that originate and/or terminate on the PSTN increases over time and if VoIP calls become exempt from access charges, ILECs would lose a substantial amount of interstate revenues needed to recover these growing costs. A ruling now exempting VoIP telephony services from access charges would shift the burden of paying a growing amount of interstate costs from the interstate jurisdiction to the intrastate jurisdiction over the next 1-3 years. NTCA urges the Commission not to unintentionally decide this separations issue in isolation. The Commission should refer separations issues incident to Level 3 petition to the Federal-State Joint Board on Separations for its recommendation.

Exempting VoIP service from access charges without first accounting for jurisdictional separations would also likely result in improperly preempting state commission jurisdiction and raise the issue of confiscation.<sup>11</sup> The Commission should not unintentionally mandate zero compensation for the obvious use of local networks without considering the jurisdictional cost shifts involved. In *Smith v. Illinois*, the Supreme Court stated that “proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction” to determine whether rates would result in confiscation.<sup>12</sup> The Court held that when distinct jurisdictional limits exist as to the determination of reasonable rates, some form of jurisdictional separations must occur. The Court further established that “reasonable measures [are] essential” and indicated that such

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<sup>11</sup> *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65 (1930).

<sup>12</sup> *Id.*

measures should not “ignore altogether the actual uses to which the property is put.”<sup>13</sup> The Commission’s actions should therefore take into consideration state commission jurisdiction and the separation of carrier property and expenses between interstate and intrastate operations in order to avoid issues of preemption and confiscation. Denying the Level 3 petition and referring the issue to the Joint Board on Separations will assist the Commission in properly addressing these issues and avoid unnecessary litigation.

#### **IV. THE ESP EXEMPTION SHOULD BE ELIMINATED**

Since 1983, the Commission has exempted ESPs from the payment of certain interstate access charges.<sup>14</sup> Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the PSTN.<sup>15</sup> Despite the Commission’s understanding that ISPs use interstate access services, the Commission has permitted ISPs to take service under local tariffs and avoid paying interstate access charges and USF contributions.

In 1997, the Commission reconfirmed its previous finding that ISPs should not be required to pay interstate access charges at that time.<sup>16</sup> The Commission explained that the then existing access charge system included non-cost-based rates and inefficient rate structures.<sup>17</sup> The

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<sup>13</sup> *Id.*

<sup>14</sup> This policy is known as the “ESP exemption.” See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access); see also Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*).

<sup>15</sup> *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. See also *Access Charge Reform Order*, 12 FCC Rcd at 16133-35.

<sup>16</sup> *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-157, ¶¶ 344-348 (First Report and Order)(rel. May, 16, 1997).

<sup>17</sup> *Id.*

Commission further reasoned that ISP purchases of tariffed primary and secondary lines provided ILECs with revenues for the costs imposed on their networks by ISPs.<sup>18</sup>

It is time to remove the ESP exemption for ISPs. The non-cost based rates and inefficient rates structures that existed in 1997, no longer exist today. With the implementation of the CALLS and MAG access reform plans for non-rural and rural ILECs access charges have been reduced to historical lows and are based on cost. Moreover, primary line growth has been flat and secondary line growth has declined. At the same time, ISP usage of the PSTN has continued to increase dramatically and has placed a significant and rapidly growing cost burden on ILECs without adequate compensation for ISP usage.

The ESP exemption permits carriers to sell their services to customers while benefiting from the free ride that ISPs receive as a result of the exemption. Exempting ISPs from access charges and USF contributions has increased the universal service burden on all remaining USF contributors. If VoIP services are added to the list of services exempt from access charges and USF contributions, the entire universal service funding system will be at risk of collapsing. The Commission should therefore remove the ESP exemption and require all ISPs, and VoIP service providers using the PSTN, to pay access charges and universal service contributions.

**V. ALL VOIP SERVICES THAT ORIGINATE AND/OR TERMINATE ON THE PSTN SHOULD BE CLASSIFIED AS A “TELECOMMUNICATIONS SERVICE” AND PAY ACCESS CHARGES AND USF CONTRIBUTIONS**

The Commission should classify all VoIP service that originates and/or terminates calls on the PSTN as a “telecommunications service” subject to access charges and universal service contributions.<sup>19</sup> The Act defines “telecommunications services” as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively

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<sup>18</sup> *Id.*

<sup>19</sup> 47 U.S.C. § 153(47).

available to the public, regardless of facilities used. Customers of Level 3's voice service pay a fee for sending and receiving voice telephone calls. From the customer's perspective, Level 3's service is identical to traditional telephone service. Level 3 uses the PSTN in the same way as other carriers who pay access and contribute to universal service in recognition of the fact that their use imposes cost on the underlying ILEC network. Level 3 clearly benefits from its use of the PSTN that is supported through access charges and USF contributions.

Level 3's service is also distinguishable from Pulver.com's VoIP service, which the Commission recently classified as an "information service."<sup>20</sup> Pulver's service does not originate or terminate on the PSTN and is not offered to the public for a fee.<sup>21</sup> Conversely, Level 3's service does originate and terminate voice calls on the PSTN and is offered to the public for a fee. Unlike Pulver's service, Level 3's service uses North American Numbering Plan (NANP) telephone numbers to facilitate voice calls throughout the PSTN.<sup>22</sup> Level 3's claim that its voice traffic uses a portion of an Internet-based platform is no excuse for paying lawful access charges and universal service contributions. The fact that Level 3 uses the PSTN, uses NANP telephone numbers, and charges customers for its voice service, clearly demonstrates that Level 3's voice service should be classified as a "telecommunications service" and that Level 3 should be required to pay access charges and USF contributions.

## **VI. CONCLUSION**

Based on the above reasons, the Commission should deny the Level 3 petition for forbearance. The Commission should eliminate the ESP exemption that allows all ISPs to avoid

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20 *In the Matter of Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, pp. 3-5. WC Docket No. 03-45 (rel. February 19, 2004).

21 *Id.*

22 *Id.*



paying access charges and USF contributions. Until the ESP exemption is removed, just compensation for ISP use of ILEC networks will not be realized, competitive neutrality will not be achieved, and the future viability of universal service will be at risk. The Commission should also refer separations issues incident to Level 3 petition to the Federal-State Joint Board on Separations for its recommendation. Finally, the Commission should classify all VoIP services that use the PSTN as “telecommunications service” and require providers of such services to pay all applicable access charges and make all appropriate contributions to the universal service funding mechanisms pending the Commission’s final decisions in its inter-carrier compensation and VoIP NPRMs.

Respectfully submitted,

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March 1, 2004

## CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 03-266, DA 04-1 was served on this 1st day of March 2004 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy

Gail Malloy

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